Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

81-453

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

PAUL LABRIOLA,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM SONENSHINE
Member of the Bar of The
Supreme Court of the
United States
Attorney for Petitioner
186 Joralemon Street
Brooklyn, New York 11201
Telephone: (212) 855-1111

THE QUESTIONS FOR REVIEW

1. Who had the right to waive a speedy trial -- the petitioner or the attorney?

2. Can a court-appointed attorney who, unbeknownst to his client had been convicted several years previously of Federal Felonies and sent to jail and has cooperated with the authorities be deemed competent to represent his client?

3. Should the Courts below have ordered an evidentiary hearing in the circumstances of this case?

4. Should the trial Court have recused itself in view of the fact that it had made the appointment of counsel and would otherwise have been a witness at the evidentiary hearing?

TABLE OF CONTENTS

		Page
A.	OPINIONS BELOW.....	2
B.	THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.....	3
C.	THE QUESTIONS PRESENTED FOR REVIEW.....	3
D.	CONSTITUTIONAL PROVISIONS INVOLVED.....	4
E.	A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED	
	1. Statement of the Case.....	5
	2. Statement of the Facts.....	6
F.	BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT.....	6
G.	ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.....	7

POINT ONE

The Trial Court should have held an evidentiary hearing into the circumstances

Page

surrounding the appointment
of a previously convicted
felon as attorney for
petitioner, and said attorney's
ensuing conduct..... 7

POINT TWO

Petitioner was prejudiced
by the conduct of his
court-appointed counsel..... 13

CONCLUSION

The judgment of conviction
should be reversed and the
indictment dismissed or, in
the alternative an evidentiary
hearing before another judge
should be ordered..... 17

TABLE OF AUTHORITIES

Page

United States Constitution
5th Amendment.....10, 12

United States Constitution
6th Amendment.....10, 12

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

PAUL LABRIOLA,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays this Court for a Writ of Certiorari to

the United States Court of Appeals for the Second Circuit as follows:

A.

OPINIONS BELOW

The United States Court of Appeals for Second Circuit, by its judgment entered in that Court on May 12, 1981 (Petition for rehearing and rehearing in banc denied July 22, 1981) unanimously affirmed a judgment entered in the United States District Court for the Eastern District of New York on March 19, 1981 (indictment No. 75CR 659-S) denying appellant's post conviction motion pro se for an evidentiary due process hearing to vacate said judgment of conviction upon the grounds, inter alia, that petitioner's court appointed attorney had been previously convicted of Federal Felonies, had his own problems and had cooperated with the authorities, and waived petitioner' constitutional speedy trial rights.

Opinions were written by the Court of Appeals and by The District Court. Copies thereof are annexed hereto as Appendices A and B respectively.

B.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 17, subdivision 1, of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on May 12, 1981, and petition for rehearing and rehearing in banc denied July 22, 1981. Said judgment of May 12, 1981 is incorporated within Appendix A, supra. The rehearing and rehearing in banc is annexed hereto as Appendix C.

C.

THE QUESTIONS PRESENTED FOR REVIEW

1. Who had the right to waive a speedy trial -- the petitioner or the attorney?

2. Can a court-appointed attorney who, unbeknownst to his client had been convicted several years previously of Federal Felonies and sent to jail and has cooperated with the authorities be deemed competent to represent his client?

3. Should the Courts below have ordered an evidentiary hearing in the circumstances of this case?

4. Should the trial Court have recused itself in view of the fact that it had made the appointment of counsel and would otherwise have been a witness at the evidentiary hearing?

D.

THE CONSTITUTIONAL PROVISIONS INVOLVED HEREIN

The constitutional provisions involved are The Sixth Amendment rights to a speedy trial and the effective representation by counsel, and The Fifth Amendment right to Due Process of Law. Pertinent provisions of each of the foregoing are set forth in Appendix D of this petition.

E.

A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Statement of the Case

Appellant was convicted in the United States District Court, Eastern District of New York, before the Honorable Mark A. Constantino, upon his plea of guilty to one (1) count of aiding and abetting forgery of stolen U.S. Savings Bonds. On April 25, 1979, he was sentenced to a prison term of three (3) years. Pursuant to agreement under F.R.C.P., 11 (e), he was permitted to appeal as to certain speedy trial issues and remain at liberty pending said appeals. (Indictment No. 75 CR 659 S).

The Second Circuit affirmed the conviction on September 25, 1979. The United States Supreme Court denied certiorari on February 19, 1980.

Thereafter, a motion for modification of

sentence was timely made. On January 23, 1981, said motion was denied. A motion for reargument was made. That motion was denied on March 20, 1981.

In the interim, appellant made the above referred to Pro Se motion dated March 16, 1981, which is the subject of the instant petition herein. (Appendix E)

Petitioner is presently incarcerated. A motion in this Court for a stay is pending sub judice.

2. The facts

The pertinent facts are set forth under the appropriate Point headings and are not re-iterated herein.

F.

BASIS FOR JURISDICTION IN
THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court fro The Eastern District of New York was invoked upon the ground that the crimes charged were Federal crimes, to wit, Title 18

Section 495 and the ensuing conviction and the instant motion to vacate the judgment of conviction arose out of the indictment in said Eastern District of New York.

G.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

POINT ONE

THE TRIAL COURT SHOULD HAVE HELD AN EVIDENTIARY HEARING INTO THE CIRCUMSTANCES SURROUNDING THE APPOINTMENT OF A PREVIOUSLY CONVICTED FELON AS ATTORNEY FOR PETITIONER, AND SAID ATTORNEY'S ENSUING CONDUCT.

Petitioner, acting Pro-Se, made a post-judgment motion in the Court below (75CR659S), before Honorable Mark A. Costantino, arising out of the Court's pre-trial appointment on January 9, 1976 of one Philip Peltz as assigned counsel for Petitioner.

Petitioner alleged the following in his moving papers:

1. The assigned attorney, Philip Peltz had been convicted in 1970 in the United States District Court for the Southern District of New York of New York Federal Felonies. Included with the motion papers were phot copies of docket entries from the records of the Southern District of New York (69CR312) showing that said attorney had been convicted after jury trial of four counts involving stock frauds. On January 9, 1970 Peltz was sentenced by Judge Weinfeld to prison terms of three months and probation for one (1) year. The conviction was affirmed by The Second Circuit on March 15, 1971 and Ceriorari was denied. A motion for modification of sentence was denied on June 30, 1971. Thereafter, on September 21, 1971, the Order of Commitment was entered showing that Peltz had been delivered to Lewisburg, Pennsylvania on July 30, 1971. Included with the moving papers were pertinent extracts from the Rules of the Court governing disciplien of attorneys convicted of Federal Felonies.

2. During the course of representing Petitioner, Peltz waived Petitioner's Speedy Trial rights, and that said "waiver" was not a knowing waiver. Included with the moving papers was an extract from the pre-trail minutes of May 12, 1976, wherein Petitioner stated:

"I want to know what I'm waiving, am I waiving outside....."

Petitioner goes on to allege that he tried Pro-Se on several occasions to withdraw the "waiver" but the Court below ruled against him on the ground that the "waiver" was counseled by Peltz, whereas the attempted withdrawal of the waiver by Appellant was made Pro Se, and therefore, not counseled.

3. Petitioner further alleged that Philip Peltz had cooperated with the government and could not have been properly defending him. Petitioner set forth that Peltz had written a letter to The Judge in which he stated in substance, that becuase of his own problems, he could not do what he should. As a result, Petitioner alleged,

Peltz could not do anyting but what the Court and prosecutor wanted, and improperly acted against Petitioner's wishes and rights. In essence, Petitoner urged that Peltz' conduct resulted in the denial of Petitioner's Sppedy Trial rights, and thedenial of the right to effective representation of counsel.

4. Petitioner alleged that the Court below know of Peltz' prior conviction. It is quite clear that the Government was at the very least chargeable, in any event, with knowledge of its own records. Peltz certainly know of his own conviction and incarceration. He was obvioulsy under a duty to the Petitioner to disclose that fact. His apparent failure to do so supports Petitioner's position as to Peltz' conduct adversely affecting petitioner's constitutional rights to a Speedy Trial, and effective representation of counsel and due process of law.

5. Petitioner further alleged that the Court below should have excused itself from the instant motion for a due process hearing because

Petitioner filed a complaint against him to then Chief Justice Mishler on December 13, 1976, and Judge Costantino would be called as a witness on the hearing.

The Government, it its affidavit opposing the stay, which The Second Circuit granted on March 24, 1981, quoted part of that complaint at the fourth page of its Exhibit I, which was the Government's statement of facts in its brief on LaBriola's judgment appeal: "Why, if he (Judge Constantino) won't go by the law, can't I get a trial?". This complaint, dated December 13, 1976, apparently followed a Pro Se motion by Appellant dated November , 1976 unsuccessfully, seeking dismissal of the indictment by reason of the Government's delay in prosecution. Here too, the Government quoted Appellant's them motion Papers at the third page of its said Exhibit I:

"a) Defendant has requested and insisted on a trial on this charge ahd has been unsuccessful. Defendant now moves for dismissal with prejudice, as the government has let 180 days elapse on the original indictment.

"b) Then the government brought a superseding indictment on March 30, 1976, and again more than 180 days have elapsed without a prompt and speedy trial, thus prejudicing defendant."

It is significant that Peitioner apparently could not succeed in inducing Peltz to move for a Speedy Trial, and was unfairly left to his own efforts in seeking one. As the Government noted at the fifth page of its aforesaid Exhibit I: "LaBriola's attorney urged for the first time (on Mya 4, 1977) that the matter should no longer be held in abeyance".

It appears from the instant motion papers that serious issues were raised regarding the appointment of Philip Peltz, a previously convicted felon as Petitioner's attorney, and said attorney's subsequent conduct in representing Petitioner, all amounting to a violation of Appellant's constitutional rights to due process of law, Speedy Trial and the effective representation of counsel. At the very least, and evidentiary hearing was required and should have been

ordered.

Additionally, Appellant alleged that since the trial judge had made the appointment of counsel and would also be a witness on the hearing, the Court should have recused itself and referred the matter to another Judge.

POINT TWO

PETITIONER WAS PREJUDICED
BY THE CONDUCT OF HIS COURT
APPOINTED COUNSEL

Petitioner made every reasonable effort to obtain a Speedy Trial but to no avail because of his attorney's counter-productive assent to continued delays. He wrote to the Chief Judge. He wrote to his attorney. He made Pro Se motions to dismiss. His said attorney, on one occasion wrote to the trial judge:

> "I feel that I am not in
> the position to pursue
> Mr. Labriola's claims in
> the vigor, diligence and

energy they deserve, i.e. without regard to the Consequences." (Underlining Ours)

It is apparent that the attorney was in a hopeless conflict of interest situation, torn between his ethical obligation to petitioner and his conviction. Thus, the attorny's own prior conviction did indeed cause a sigificant prejudice to petitioner the full extent of which should have been determined upon a hearing.

It might be noted parenthetically that had the Southern and Eastern District Courts pursued the matter of the attorney's conviction and filed the appropriate Certificate, the attorney would have been disbarred years before he was appointed counsel for the petitioner and petitioner would not have been so prejudicially saddled with the attorney's problems to his detriment. Petitioner was entitled to more than counsel - he was entitled to effective counsel.

In this regard the Court may wish to consider that at the time the jury was selected petitioner was already serving a five year federal sentence and a 3-1/2 to 7 year state sentence for the same crime arising out of the same course of conduct but different dates. Had he proceeded to trial then, and been convicted, he could well have received a concurrent sentence.

Yet now, by virtue of the delay in that case he has alread served the earlier Federal Sentence and the State sentence has been overturned. If the instant conviction stands, he will now be required to begin the three year sentence which could otherwise have been served concurrently several years ago.

Moreover even if the instant sentence was made consecutive to the earlier Federal sentence, the Bureau of Prisons would have aggregated the two so that petitioner would have been released in less time than he must now serve.

Thus, petitioner had nothing to lose and all to gain by proceeding with a trial at that

time. Yet his right to waive or not waive a Speedy trial was taken from him and given to the attorney who then unilaterally exercised it directly contrary to petitioner's expressed desires. The right to waive, however, should belong to the client not to the attorney.

In the final analysis, the issue is whether in the aforesaid posture of the case, the attorney had the legal right to override petitioner's expressed desire for a speedy trial to petitioner's aforesaid prejudice. The attorney's conduct and motives in this regard mandated an evidentiary hearing.

CONCULUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR, IN THE ALTERNATIVE AN EVIDENTIARY HEARING BEFORE ANOTHER JUDGE SHOULD BE ORDERED.

Dated: August 19, 1981

Respectfully submitted,

WILLIAM SONENSHINE
Attorney for
Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States House, in the City of New York, on the 12th day of May, one thousand nine hundred and eight-one.

P R E S E N T:

HONORABLE J. EDWARD LUMBARD

HONORABLE JAMES L. OAKES

Circuit Judges,

HONORALBE MILTON POLLACK,

District Judge

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE

-against- 81-1086

PAUL LaBRIOLA,

DENENDANT-APPELLANT

Paul Labriola appeals from an order of Judge

Costantino of the Eastern District of New York which denied his post-conviction motion seeking (1) a hearing on his claim of ineffective assistance of counsel and (2) recusal of Judge Constantino because he would be called as a witness at such a hearing. We affirm.

LaBriola was indicted on March 29, 1976 on 38 counts of forging and uttering forged U.S. Savings Bonds. Judge Costantino appointed Philip Peltz to defend LaBriola, selecting him from a list of authorized Criminal Justice Attorneys. Peltz, however, had been convicted of federal securities crimes in the Southern District of New York in 1970. See United States v. Peltz, 433 F. 2d 48 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971). LaBriola's assertion of ineffective assistance of counsel is based on Peltz's criminal record. Because no certified copy of the judgment of Peltz's conviction had been filed in the Eastern District, Peltz had not been suspended from practice before that court as provided by the local rules. Accordingly, during the period for which LaBriola challenged the

effectiveness of Pelt'z representation, Peltz remained a member in good standing of the state bar and the bar of the Eastern District.

At LaBriola's arraignment on March 10, 1976, the government announced that it was prepared to to to trial. LaBriola, however, moved to dismiss the indictment upon United States v. Mauro, 414, F Supp. 358 (E.D.N.Y. 1976). The district court in Mauro had dismissed an indictment against a defendant who, like LaBriola, had been removed from state custody for arraignment on a federal indictment and then returned to state custody without first being tried on the federal charges. At a hearing on LaBriola's motion, the government stated that it was pursuing an appeal in Mauro, and Judge Costantino expressed his disagreement with the case's holding and his preference for proceeding to trial. However, the government and LaBriola, through Peltz, agreed to an indefinite postponement of trial to avoid an unnecessary one should Mauro be affirmed; LaBriola accordingly waived his right to a speedy trial.

On October 26, 1976, this court affirmed Mauro. 544 F. 2d 558 (2d Cir. 1976). On November 1, 1976, LaBriola filed a pro se motion seeking dismissal of the indictment because, among other grounds, the government had failed to prosecute. The government responded to LaBriola's pro se motion on December 3, 1976, but defense counsel did not urge an immediate trial at any of the hearings while Mauro remained on appeal. After denial of the government's rehearing petition in Mauro, however, Judge Costantino dismissed the indictment against LaBriola, and this court affirmed. United States v. LaBriola, 573 F 2d. 1298 (2d Cir. 1977).

The government petitioned for certiorari in both Mauro and LaBriola, and the Supreme Court eventually reversed Mauro 436 U.S. 340 (1978), and remanded LaBriola for further consideration in light of Mauro), 436 U.S. 942 (1978). Thereafter, on July 24, 1978, this court reinstated the indictment against LaBriola.

During the pendency of those cases, in early 1977m Peltz was disbarred by the New York

State Appellate Division. The district court appointed Carol Mellor, a one-time associate of Peltz, to represent LaBriola.

After two adjournments to allow him opportunities for pretrial motions, LaBriols pled guilty on February 15, 1979 to one count of forgery of stolen U.S. Savings bonds. The district court sentenced him to three years imprisonment. This court affirmed the conviction, 614, F 2d 1292 (1979), and the Supreme Court denied review, 444 U.S. 1073 (1980).

On March 16, 1981, LaBriola moved pro se fro a hearing on his due process rights, asserting that Peltz's fear of revealing his own criminal record denied LaBriola's right to effective assistance of counsel. LaBriola also moved that Judge Costantino recuse himself from that hearing becuase he had appointed Peltz and would therefore be called as a witness at the hearing.

We agree with Judge Costantino that LaBriola failed to allege any facts warranting further hearings in his case. Nothing in LaBriola's

allegations indicated that he was actually prejudiced by Peltz's representation. United States v. Wight, 176 F 2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950.

To the contrary, any attorney would have attempted to save LaBriola from an unncessary trial by urging him to waive his speedy trial rights pending resolution of Mauro. Moreover, when Labriola pled guilty to two years after Peltz had been disbarred, he was represented by new counsel, Carol Mellor. LaBriola's only challenge to Mellor's representation is that, because of her one-time association with Peltz, she may have presented a less-than-vigorous defense so as to avoid drawing attention to Peltz's conviction. This argument overlooks that Peltz had already been disbarred before Mellor was appointed: she obviously had no motive to protect Peltz from a disbarment that had alread occurred.

S/ EDWARD LUMBARD

EDWARD LUMBARD

S/ JAMES L. OAKES

JAMES L. OAKES

Circuit Judges

S/ MILTON POLLACK

MILTON POLLACK

District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

-against-

MEMORANDUM AND ORDER

PAUL LaBRIOLA,

Defendant,
----------X

COSTANTINO, D.J.

On March 19, 1981, defendant, Paul LaBriola, moved this court ot recuse itself from criminal case 75 CR 659. Defendant claims, inter alia, that this court has prejudiced him by appointing an attorney Philip Peltz, who it know was not qualified to practice law. Prior to passing on this motion, the court learned of the following facts, to wit: (1) at the time of his appointment by this court on January 6, 1976, Mr. Peltz had not been disbarred. In fact, he was selected from an authorized list of Criminal Justice Attorneys ("CJA"): (2) subsequent to his handling of the LaBriola matter, and approximately one year after his appointment by this court, Mr. Peltz was

disbarred; (3) at all times during the proceedings before this court in which Mr. Petz represented Mr. LaBriola, Mr. Peltz comported himself well and was thoroughly prepared to defend his client's interest.

The court feels constrained to make several additional observations. Mr. BaBriola was sentenced by this court on April 25, 1979 to three years incarceration for the forjery of stolen United States Savings Bonds. His appellate remedies having been fully exhausted, the defendant should have begun serving his term of imprisonment immediately thereafter. Through a clerical error in United States Attornye's Office, Mr. LaBriola has been able to avoid serving that term. On February 23, 1981, the court, in its discretion, stayed the commencement of the sentence unitl March 24, 1981 so that Mr. LaBriola could complete some dental work.

The court once again has before it the defendant's file. The court finds that since the notification of defendant's time to serve

his term of imprisonment, he has attempted to thwart the administration of justice. In re-examining the reasons put forth by the defendant for seeking to stay a sentence which was imposed in 1979, the court finds no palatable reason to justify defendant's request. In light of the fact that Mr. LaBriola should have begun serving hsi sentence more than one year ago, this court, after examining the factors surrounding the fefendant's continued success in avoiding the-sentence imposed in April of 1979, feels compelled to revoke the stay.

So Ordered.

_____

U. S. D. J.

APPENDIX C

At a stated term of the United States Court of Appeals in and for the Second Circuit held at teh United States Court House, in the City of New York, on the 22nd day of July, one thousand nine hundred and eighty-one.

----------X

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. No. 81-1086

PAUL LaBRIOLA,

Defendant-Appellant

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Paul LaBriola

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing

is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro

A. Daniel Fusaro
Clerk

by Francis S. Ginhait
Chief Deputy Clerk

APPENDIX D

UNITED STATES CONSTITUTION

fifth Amendment:

"No person shall....be deprived of life, liberty, or property without due process of law....."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial....and to have the Assistance of Counsel for his defense."

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

-against-

PAUL LaBRIOLA,

Defendant.

NOTICE OF MOTION
IND. NO.
75 CR 659 S

----------X

Motion for Recousal and a Due Process Hearing and a Stay of Execution of the Sentence.

Comes now, Pro-se, PAUL LaBRIOLA hereinafter called the Defendant.

The Defendant moves that the HONORABLE MARK A. COSTANTINO recouse himself from the case designated Docket #75CR659S on the following grounds:

1. This Honorable Court on January 9, 1976 assigned Philip Peltz to protect the constitutional rights of the defendant. It has come to the attention of the defendant that Philip Peltz assigned by the Court was not qualified to represent defendant because Mr. Peltz was convicted of a Federal Crime, prior to being assigned to represent defendant.

2. Philip Peltz waived a speedy trial right of the defendant on or about May 21, 1976. The defendant tried on several occasion to withdraw said waiver. This Honoralbe Court ruled that the waiver was counseled (Philip Peltz) and the withdrawal of the waiver not counseled (PAUL LaBRIOLA - Pro-Se). This defendant now claims that since Philip Peltz did not qualify to represent defendant then the waiver is not counseled and certainly the withdrawal by the defendant in this light, certainly has the final say. Further, it certainly shows in the record that this defendant did not waive, because this defendant inquires into teh Court as to what is being waived, and this Court shut the defendant up. Further, there is absolutely no doubt that this defendant;

(a) never waived nor can it be in the wildest sense, if waived, a knowledgeable waiver.

Further, it is also my understanding that Philip Peltz also cooperated with the Government and could not possibly be there defending me. It is further substantiated, since Philip Peltz himself wrote a letter to the Judge stating

"because of his own problems, he could not do what he should". There is no doubt that Philip Peltz could not do anything but that the Court and the prosecutor wanted. This defendant alleges that Philip Peltz acted against defendant's wishes and rights.

3. The defendant claims that this Honorable Court should excuse himself from this proceeding, because the defendant also filed complaint against this Honorable Court on December 13, 1976, to the then Chief District Judge Jacob Mischler.

4. There is no question of the prejudice this Court has shown towards defendant, and now in light of defendant claiming that this Honorable Court knew that Philip Peltz was not qualified to represent defendant, and certainly this Honorable Court had an obligation to inform defendant, but chose not to. It is equally obvious that the responsibility was also on the Government, to inform defendant of the situation, but also, chose not to.

5. Defendant claims that he has the right to inquire, and that a Due Process Hearing should be granted, and this Honorable Court will have to testify.

WHEREFORE, it is respectfully prayed that this Motion be granted in that the HONORABLE MARK A. COSTANTINO recouse himself from this case, because I intend to call JUDGE COSTANTINO as a witness in this Due Process Hearing, and it is obvious that he cannot sit at this Hearing. A Due Process Hearing should be ordered and a stay of execution be granted until all litigation of this Motion bre resolved, and whatever else this Honorable Court deems just and proper.

Respectfully submitted,

PAUL LaBRIOLA,

Pro-Se

SWORN TO before me this 16th

day of March, 1981

Copy to:

Assistant U.S. Attorney

JOEL COHEN

Chief District Judge

HONORABLE JACK WEINSTEIN

HONORABLE JACOB MISCHLER